

FHFA Status Report on Depositions

November 13, 2013

VIA ELECTRONIC MAIL AND ECF

The Honorable Denise L. Cote
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1610
New York, NY 10007-1312

Re: FHFA Actions, No. 11-cv-6202, et al., (S.D.N.Y.) (DLC)

Dear Judge Cote:

On behalf of Plaintiff Federal Housing Finance Agency ("FHFA"), we write to:

- (1) update the Court on the status of deposition discovery in the S.D.N.Y. coordinated cases;
- (2) seek relief from the December 6, 2013 deadline to enable the fair scheduling of the depositions of six Credit Suisse witnesses in that action;
- (3) seek approval of the parties' agreement in the *Morgan Stanley* action to conduct one deposition of a Morgan Stanley witness after December 6 to accommodate the witness and her individual counsel;
- (4) seek approval of the parties' agreement in the *Merrill Lynch* and *Bank of America* cases to conduct Rule 30(b)(6) depositions of Defendants' representatives on or before December 13, 2013; and
- (5) note the potential need for similarly targeted additional relief from the December 6 deadline.

Status of Depositions

FHFA expects that Defendants' depositions of all FHFA's witnesses will be completed by the December 6 deadline. As of yesterday, Defendants had conducted 16 of the 26 depositions of FHFA and GSE personnel that they have sought. The remaining ten depositions of FHFA's witnesses are scheduled to take place before December 6, with the exception of the deposition of Peter Nicolescu, which was the subject of a Court Order entered yesterday. Defendants have further conducted four days of Rule 30(b)(6) testimony of the GSEs' corporate representatives, with one additional day to be scheduled before December 6 for the Rule 30(b)(6) testimony of FHFA's representative.

FHFA also expects that the vast majority of its depositions of Defendants' witnesses will be completed by December 6. FHFA anticipates that it will depose approximately 243 witnesses in their individual capacities in the S.D.N.Y. coordinated cases;¹ of these, FHFA has either taken or is scheduled to conduct before December 6 a total of 218 depositions.² To complete its depositions, FHFA has, for most days between now and December 6, waived the

¹ The Court's Amended Order Regarding Deposition Protocol (Dkt. Entry 452) (the "Deposition Protocol") presumptively allows FHFA to depose all Individual Defendants as well as 20 additional individual witnesses per action, a total of 284 in the cases being coordinated in the S.D.N.Y.

² These figures do not include an additional 59 depositions that FHFA took in cases that settled (*UBS*, *Ally*, *JPMorgan*).

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five-deposition a day limit established by Section II.B of the Deposition Protocol,³ agreeing to as many as 13 depositions per day.⁴

Notwithstanding the very substantial volume of work that will be completed before December 6, however, FHFA does not expect every deposition of Defendants' witnesses to be completed by the current deadline. For the reasons described below, it respectfully requests that the Court to compel Credit Suisse to provide dates for depositions of six of its individual witnesses between December 9 and 20, 2013. FHFA also seeks approval of the parties' agreement in the *Morgan Stanley* action to conduct a single deposition after December 6 (to accommodate the witness and her individual counsel), and the parties' agreement in the *Merrill Lynch* and *Bank of America* actions to conduct Rule 30(b)(6) depositions of Defendants' representatives on or before December 13. Finally, FHFA believes that there may be other depositions as to which FHFA, or the parties jointly, may seek similarly targeted relief, including all Rule 30(b)(6) depositions in six actions in which Defendants have not yet offered dates for those depositions, and certain remaining Rule 30(b)(6) depositions in two other cases.⁵

The Credit Suisse Action

While the scheduling of depositions of Defendants' individual capacity witnesses has substantially been completed, FHFA has reached an impasse in *Credit Suisse* and respectfully requests that the Court compel Credit Suisse to provide dates for six of its witnesses between December 9 and December 20, 2013. Credit Suisse has been the most frequent violator of the Protocol requirements that a party offer a deposition date no more than ten days after receiving the request, and propose a date that falls within 45 days of the request. Credit Suisse took longer than ten days to provide dates for 24 of the 31 depositions that FHFA requested, and 21 of the 24 dates it offered late were also outside of the 45-day limit. Having delayed and proposed a disproportionate number of dates at the end of the deposition period, Credit Suisse has insisted that FHFA schedule the depositions of six substantial witnesses on dates between now and December 6 on which FHFA has already scheduled between five and 11 other depositions.⁶

³ Section II.B provides: "Other than for good cause shown, no more than five depositions shall be conducted on any one day, subject to consensual adjustment by the scheduling committees (as defined in Section II.F, *infra*, or by the Court at a future date."

⁴ Until recently, Defendants refused to depose two or more FHFA witnesses on the same day. FHFA by contrast agreed to more than five depositions proceeding on the following dates between now and December 6, with the number of depositions for each date indicated in parentheses: November 13 (8), November 14 (8), November 15 (9), November 19 (10), November 20 (6), November 21 (9), November 22 (11), November 26 (13), December 3 (9), December 4 (11), and December 5 (7).

⁵ Although FHFA is discussing with Defendants scope and timing, under the Deposition Protocol FHFA is entitled to depose a representative of each underwriter Defendant for one full day and of each other corporate Defendant for one half day. Protocol ¶¶ II(C). There are approximately 30 corporate Defendants to be deposed in the six cases in which the parties have not yet agreed on dates or approximate dates for Rule 30(b)(6) testimony: *Deutsche Bank*, *Goldman Sachs*, *Credit Suisse*, *HSBC*, *Barclays*, and *First Horizon*. Additionally, while FHFA has completed depositions of certain corporate Defendants in *Morgan Stanley* and *Soc Gen*, there are another five corporate Defendants to be deposed in those actions.

⁶ Credit Suisse sought to schedule the depositions of three of these six witnesses (Margaret Dellafera, Christopher Schoen, and Robert Sacco) on dates on which between five and 11 depositions had already been scheduled. It has not offered any dates for the depositions of three other witnesses (John Vibert, Kenneth Rosenberg,

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Section II.B of the Protocol provided a safeguard against precisely the conduct in which Credit Suisse has engaged: the backloading and stacking of depositions just before the deposition deadline. Credit Suisse has acted sufficiently slowly vis-à-vis the other Defendants that its effort now to compel FHFA to proceed with depositions of multiple important witnesses in a single case, on dates on which FHFA is already conducting and defending far more depositions than the limit to which Defendants agreed, will unfairly prejudice FHFA. To allow the parties to complete those depositions in an equitable and efficient manner, FHFA respectfully requests that the Court order that, except where the parties agree to earlier dates, Credit Suisse shall provide deposition dates for the six witnesses whose depositions remain to be scheduled between December 9 and December 20, 2013, and shall attempt to minimize the number of such depositions scheduled for a single day.

The Morgan Stanley Action

In the *Morgan Stanley* action, FHFA seeks approval of the parties' agreement that a single Morgan Stanley witness, Pamela Barrow, be deposed after the December 6 deadline because of the unavailability of the witness and her individual counsel before that date.

The Merrill Lynch and Bank of America Actions

Because of the difficulty of scheduling Rule 30(b)(6) depositions as well before the December 6 deadline, the parties to the *Merrill Lynch* and *Bank of America* cases have agreed, subject to the Court's approval, to extend that deadline to December 13 to conduct Rule 30(b)(6) depositions. The parties therefore seek the Court's authorization for the proposed change to the December 6 deadline for Rule 30(b)(6) depositions.

Other Potential Requests for Relief

FHFA anticipates that it may request additional relief relating to depositions, alone or jointly with Defendants, of a targeted nature similar to the requests above. In particular, all Rule 30(b)(6) depositions remain to be scheduled in six actions (*Goldman Sachs*, *Deutsche Bank*, *Credit Suisse*, *HSBC*, *Barclays*, and *First Horizon*), as FHFA is awaiting the Defendants' proposal of dates for those depositions. In two additional actions, *Morgan Stanley* and *SocGen*, Rule 30(b)(6) depositions have commenced but others remain to be scheduled. Because of the press of completing other depositions before December 6 and the possibility that the scope of the Rule 30(b)(6) depositions can be narrowed based on an evaluation of the testimony obtained in the other, ongoing depositions, FHFA may explore agreements such as the one reached in *Merrill Lynch* and *Bank of America* cases, if the Court deems that agreement acceptable. Discussions among the parties continue and thus FHFA will address the topic of further relief in future correspondence, if necessary.

For the foregoing reasons, FHFA respectfully requests that the Court: (1) compel Credit Suisse, except where the parties agree to earlier dates, to provide deposition dates for the six

and David Neugebauer), each of whom were noticed more than 10 days ago. FHFA is entitled to depose five of the six witnesses for two days each, and has accepted dates for nine Credit Suisse depositions between now and December 6.

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witnesses whose depositions remain to be scheduled between December 9 and December 20, 2013, and attempt to minimize the number of such depositions scheduled for a single day; (2) so-order the parties' agreement in the *Morgan Stanley* action that the deposition of Pamela Barrow may be taken after December 6; and (3) so-order the parties' agreement that Rule 30(b)(6) depositions in the *Merrill Lynch* and *Bank of America* actions may be taken until December 13, 2013. FHFA is available for a status conference or to provide a supplemental report at the Court's convenience.

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Respectfully submitted,

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cc: All Counsel of Record